

1 HON. RICARDO S. MARTINEZ  
2  
3  
4  
5  
6  
7  
8

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BACKPAGE.COM, LLC,

Plaintiff,

and

THE INTERNET ARCHIVE,

Plaintiff-Intervenor,

v.

ROB MCKENNA, Attorney General of the  
State of Washington; RANDY J. FLYCKT,  
Adams County Prosecuting Attorney;  
BENJAMIN C. NICHOLS, Asotin County  
Prosecuting Attorney; ANDREW K. MILLER,  
Benton County Prosecuting Attorney; GARY A.  
RIESEN, Chelan County Prosecuting Attorney;  
DEBORAH S. KELLY, Clallam County  
Prosecuting Attorney; ANTHONY F. GOLIK,  
Clark County Prosecuting Attorney; REA L.  
CULWELL, Columbia County Prosecuting  
Attorney; SUSAN I. BAUR, Cowlitz County  
Prosecuting Attorney; STEVEN M. CLEM,  
Douglas County Prosecuting Attorney;  
MICHAEL SANDONA, Ferry County  
Prosecuting Attorney; SHAWN P. SANT,  
Franklin County Prosecuting Attorney;  
MATTHEW L. NEWBERG, Garfield County  
Prosecuting Attorney; ANGUS LEE, Grant

INTERNET ARCHIVE'S COMPLAINT IN  
INTERVENTION

Case No.: 2:12-cv-00954-RSM

Case No.: 2:12-cv-00954-RSM

**COMPLAINT IN INTERVENTION  
FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF  
REGARDING SB 6251**

1 County Prosecuting Attorney; H. STEWARD  
 2 MENEFEE, Grays Harbor County Prosecuting  
 3 Attorney; GREGORY M. BANKS, Island  
 4 County Prosecuting Attorney; SCOTT W.  
 5 ROSEKRANS, Jefferson County Prosecuting  
 6 Attorney; DAN SATTERBERG, King County  
 7 Prosecuting Attorney; RUSSELL D. HAUGE,  
 8 Kitsap County Prosecuting Attorney;  
 9 GREGORY L. ZEMPEL, Kittitas County  
 10 Prosecuting Attorney; LORI L. HOCTOR,  
 11 Klickitat County Prosecuting Attorney;  
 12 JONATHAN L. MEYER, Lewis County  
 13 Prosecuting Attorney; JEFFREY S.  
 14 BARKDULL, Lincoln County Prosecuting  
 15 Attorney; MICHAEL K. DORCY, Mason  
 16 County Prosecuting Attorney; KARL F.  
 17 SLOAN, Okanogan County Prosecuting  
 18 Attorney; DAVID J. BURKE, Pacific County  
 19 Prosecuting Attorney; THOMAS A.  
 20 METZGER, Pend Oreille County Prosecuting  
 21 Attorney; MARK LINDQUIST, Pierce  
 22 County Prosecuting Attorney; RANDALL K.  
 23 GAYLORD, San Juan County Prosecuting  
 24 Attorney; RICHARD WEYRICH, Skagit  
 25 County Prosecuting Attorney; ADAM N.  
 26 KICK, Skamania County Prosecuting  
 Attorney; MARK K. ROE, Snohomish  
 County Prosecuting Attorney; STEVEN J.  
 TUCKER, Spokane County Prosecuting  
 Attorney; TIMOTHY D. RASMUSSEN,  
 Stevens County Prosecuting Attorney; JON  
 TUNHEIM, Thurston County Prosecuting  
 Attorney; DANIEL H. BIGELOW,  
 Wahkiakum County Prosecuting Attorney;  
 JAMES L. NAGLE, Walla Walla County  
 Prosecuting Attorney; DAVID S.  
 McEACHRAN, Whatcom County  
 Prosecuting Attorney; DENIS P. TRACY,  
 Whitman County Prosecuting Attorney;  
 JAMES P. HAGARTY, Yakima County  
 Prosecuting Attorney,

26 Defendants, in their official capacities.

1 Plaintiff-Intervenor the Internet Archive (“the Internet Archive” or “Intervenor”) alleges  
 2 as follows:

3 **INTRODUCTION**

4 1. The Internet Archive brings this action to preliminarily and permanently enjoin  
 5 enforcement of a new Washington law, Senate Bill 6251 (“SB 6251”), that, if effective, would  
 6 impose an intolerable burden on free speech, in violation of Section 230 of the Communications  
 7 Decency Act of 1996 (47 U.S.C. § 230) (“CDA 230” or “Section 230”) and the First and  
 8 Fourteenth Amendments to and the Commerce Clause of the United States Constitution.

9 2. SB 6251 would effectively coerce, by threat of felony prosecution, online service  
 10 providers to become censors of third-party users’ content by threatening five years imprisonment  
 11 and a \$10,000 fine per violation against anyone who knowingly publishes, disseminates or  
 12 displays or anyone who “indirectly” “causes” the publication, dissemination, or display of  
 13 content that contains an explicit or even “implicit” offer of any sexual contact for “something of  
 14 value” in Washington if the content includes an image that turns out to be of a minor. Because  
 15 of its expansive language (*i.e.*, “indirectly” “causes”), the law could be applied not only to online  
 16 classified ad services like Backpage.com but also to any web site that provides access to third-  
 17 party content, including user comments, reviews, chats, and discussion forums, and to social  
 18 networking sites, search engines, Internet service providers, and more. A law that takes such an  
 19 overbroad approach is of serious concern to the Internet Archive, which aims to serve as a library  
 20 for the Internet, and accordingly, houses more than *150 billion* web pages archived since 1996.

21 3. The law expressly states that it is not a defense that the defendant did not know  
 22 that the image was of a minor. Instead, to avoid prosecution, the defendant must obtain  
 23 governmental or educational identification for the person(s) depicted in the post (notably, even if  
 24 that ID does not contain a photograph). This means that service providers – no matter where  
 25 headquartered or operated – may be asked to review each and every piece of third-party content  
 26 accessible through their services to determine whether the content is an “implicit” ad for a

1 commercial sex act in Washington, whether it includes a depiction of a person, and, if so, obtain  
 2 and maintain a record of the person's ID. These obligations would severely impede the practice  
 3 of hosting third-party content online.

4. SB 6251 violates well-established law. Section 230 of the Communications  
 5 Decency Act prohibits interactive computer service providers from being "treated as the  
 6 publisher or speaker of any information" provided by a third party and expressly preempts state  
 7 laws inconsistent with this protection. The First and Fourteenth Amendments to the U.S.  
 8 Constitution also prohibit state laws that severely inhibit and impose strict criminal liability on  
 9 speech, which SB 6251 could be interpreted to do. The statute is also vague and overbroad in  
 10 violation of the First and Fourteenth Amendments to the U.S. Constitution, likely to result in the  
 11 chilling of protected speech by service providers. Finally, the Commerce Clause also prohibits  
 12 states from passing and enforcing legislation, like SB 6251, that regulates activity beyond the  
 13 state's borders. Unfortunately, other states are poised to follow Washington's lead – a similar  
 14 law will soon take effect in Tennessee, and the legislatures of New York and New Jersey are  
 15 considering analogous bills.

5. The Court already temporarily enjoined enforcement of SB 6251. It should now  
 6 permanently do so. Otherwise, online service providers who provide access to third-party  
 7 content will soon be faced with the prospect of choosing whether to block significant amounts of  
 8 third-party content, uncertain as to what is unlawful, or to gamble against the risk of felony  
 9 criminal charges, penalties and imprisonment.

## 21 PARTIES

22. Plaintiff-Intervenor the Internet Archive is a 501(c)(3) non-profit organization,  
 23 organized and existing under the laws of the state of California, with its principal place of  
 24 business in San Francisco, California.

25. Defendant Rob McKenna is Attorney General of the State of Washington.

26. The remaining Defendants – Randy J. Flyckt, Benjamin C. Nichols, Andrew K.

1 Miller, Gary A. Riesen, Deborah S. Kelly, Anthony F. Golik, Rea L. Culwell, Susan I. Baur,  
 2 Steven M. Clem, Michael Sandona, Shawn P. Sant, Matthew L. Newberg, Angus Lee, H.  
 3 Steward Menefee, Gregory M. Banks, Scott W. Rosekrans, Dan Satterberg, Russell D. Hauge,  
 4 Gregory L. Zempel, Lori L. Hoctor, Jonathan L. Meyer, Jeffrey S. Barkdull, Michael K. Dorcy,  
 5 Karl F. Sloan, David J. Burke, Thomas A. Metzger, Mark Lindquist, Randall K. Gaylord,  
 6 Richard Weyrich, Adam N. Kick, Mark K. Roe, Steven J. Tucker, Timothy D. Rasmussen, Jon  
 7 Tunheim, Daniel H. Bigelow, James L. Nagle, David S. McEachran, Dennis P. Tracy, and James  
 8 P. Hagarty – are county prosecutors in Washington State for each of the counties as identified in  
 9 the caption above. They are responsible for the enforcement of criminal laws of the state of  
 10 Washington and for initiating proceedings for the arrest and prosecution of individuals suspected  
 11 of felony crimes and for civil actions in which their respective counties are parties.

12 9. All Defendants are sued in this action in their official capacities as representatives  
 13 of the State of Washington and their respective counties.

14 **JURISDICTION AND VENUE**

15 10. This Court has jurisdiction of this action under 28 U.S.C. § 1331 because  
 16 Intervenor alleges a violation of 42 U.S.C. § 1983.

17 11. The Court may declare the legal rights and obligations of the parties in this action  
 18 pursuant to 28 U.S.C. § 2201 because the action presents an actual case or controversy within the  
 19 Court's jurisdiction.

20 12. Venue is proper in this Court under 28 U.S.C. § 1391 because several of the  
 21 Defendants in this action are located and reside in this judicial district, and all Defendants reside  
 22 in the State of Washington.

23 **FACTUAL ALLEGATIONS**

24 13. The Internet Archive is a 501(c)(3) non-profit that was founded in 1996 to build  
 25 an Internet library. It offers permanent access for researchers, historians, scholars, people with  
 26 disabilities, and the general public to historical collections that exist in digital format.

1       14. Today Intervenor includes texts, audio, moving images, and software as well as  
 2 archived web pages in its collections, and provides specialized services for adaptive reading and  
 3 information access for the blind and other persons with disabilities.

4       15. Intervenor collects and displays web materials on behalf of the Library of  
 5 Congress, the National Archives, state archives and libraries, as well as universities and other  
 6 countries, working to preserve a record for generations to come.

7       16. As part of its mission to create an accurate and historically relevant archive of the  
 8 Internet, Intervenor regularly gathers “snapshots” – accessible copies – of content on the World  
 9 Wide Web through its “crawling” and indexing processes. It currently maintains over 150  
 10 billion web pages archived from 1996 to nearly the present from web sites around the world,  
 11 including archives of third-party content posted to Backpage.com.

12       17. Archived materials in Intervenor’s collection can be accessed at  
 13 <http://www.archive.org>.

14       18. In 2010, a group of state attorneys general (“AGs”) demanded that the online  
 15 classified ad service craigslist remove its adult services category. Defendant McKenna did not  
 16 join the demand because, as a spokesperson for his office stated, it could cause users to post the  
 17 same ads elsewhere on craigslist, making it more difficult for law enforcement to police the site.

18       19. In September 2010, craigslist removed the adult services category from its web  
 19 site. Almost immediately, adult ads migrated to other categories and web sites, including  
 20 Backpage.com.

21       20. Upon information and belief, soon after craigslist eliminated its adult services  
 22 category, the same AGs wrote to Backpage.com insisting that it eliminate its adult category.

23       21. Upon information and belief, shortly after McKenna became president of the  
 24 National Association of Attorneys General (“NAAG”), that organization sent and publicly  
 25 released a letter to Backpage.com demanding removal of the adult category and requesting  
 26 numerous categories of information from Backpage.com “in lieu of a subpoena.” At the time,

1 McKenna admitted that state AGs “have little legal standing to forcibly shut down the site” and  
 2 that the Communications Decency Act provided “broad immunity” to web sites for third-party  
 3 content, presenting a “high barrier” for any actions that state AGs might pursue.

4 22. Earlier this year, both houses of the Washington legislature passed and Governor  
 5 Christine Gregoire signed, SB 6251, which provides:

6 (1) A person commits the offense of advertising commercial sexual abuse of a  
 7 minor if he or she knowingly publishes, disseminates, or displays, or causes  
 8 directly or indirectly, to be published, disseminated, or displayed, any  
 9 advertisement for a commercial sex act, which is to take place in the state of  
 Washington and that includes the depiction of a minor.

10 (a) “Advertisement for a commercial sex act” means any  
 11 advertisement or offer in electronic or print media, which includes  
 either an explicit or implicit offer for a commercial sex act to occur  
 in Washington.

12 (b) “Commercial sex act” means any act of sexual contact or sexual  
 13 intercourse, both as defined in chapter 9A.44 RCW, for which  
 something of value is given or received by any person.

14 (c) “Depiction” as used in this section means any photograph or  
 15 visual or printed matter as defined in RCW 9.68A.011 (2) and (3).

16 (2) In a prosecution under this statute, it is not a defense that the defendant did  
 17 not know the age of the minor depicted in the advertisement. It is a defense,  
 18 which the defendant must prove by a preponderance of the evidence, that the  
 19 defendant made a reasonable bona fide attempt to ascertain the true age of the  
 20 minor depicted in the advertisement by requiring, prior to publication,  
 21 dissemination, or display of the advertisement, production of a driver's license,  
 22 marriage license, birth certificate, or other governmental or educational  
 identification card or paper of the minor depicted in the advertisement and did  
 not rely solely on oral or written representations of the minor's age, or the  
 apparent age of the minor as depicted. In order to invoke the defense, the  
 defendant must produce for inspection by law enforcement a record of the  
 identification used to verify the age of the person depicted in the advertisement.

23 23. During hearings on SB 6251 and in public statements, Washington senators  
 24 recognized that the law is vulnerable to challenge under CDA 230 and as an infringement of free  
 25 speech under the Constitution. Legislators also stated that they sought to eliminate escort ads and  
 26 similar Internet postings.

24. After the legislature passed SB 6251, on a web site promoting his gubernatorial campaign, McKenna reiterated his call for Congress to amend Section 230 so that states would not be hampered in their ability to take enforcement action against web sites and other computer services.

25. SB 6251 was originally scheduled to go into effect on June 7, 2012. However, on June 5, 2012, this Court granted Plaintiff Backpage.com's motion for a temporary restraining order, enjoining Defendants "from taking any actions to enforce SB 6251 or pursue prosecution under the law in any way" until June 19, 2012. Pursuant to the June 5 order, the parties stipulated to extend the TRO until the Court rules on Backpage.com's pending preliminary injunction motion.

26. Online service providers such as Intervenor face a reasonable apprehension of prosecution under SB 6251 if it is allowed to go into effect, based on the vague standards of the law in criminalizing dissemination of any third-party content containing an “implicit offer” of sex for “something of value” and a depiction of a minor – with no requirement of scienter and no defense that an online service provider did not know or had no reason to know that the person depicted in an online posting was a minor.

27. Members of the public generally and particularly Internet users desiring to post third-party content will be irreparably harmed if SB 6251 is allowed to take effect because their rights of free speech will be burdened or precluded.

**CLAIM I: VIOLATION OF THE COMMUNICATIONS DECENCY ACT,  
47 U.S.C. § 230, PURSUANT TO 42 U.S.C. § 1983**

28. Intervenor incorporates paragraphs 1-27 as if fully set forth herein.

29. Intervenor is a provider and user of an “interactive computer service” within the meaning of 47 U.S.C. § 230 because it makes third-party content available to the public at its web site, [www.archive.org](http://www.archive.org).

30. SB 6251 violates Intervenor's rights under 47 U.S.C. § 230, because enforcement

1 of the new law would treat Intervenor, a provider of an interactive computer service, as the  
 2 publisher or speaker of information provided by another information content provider.

3 31. SB 6251 is a “State … law that is inconsistent with” Section 230, in direct  
 4 violation of 47 U.S.C. § 230(e)(3).

5 32. SB 6251 violates and is preempted by Section 230, and the state law therefore  
 6 should be enjoined and declared invalid.

7 **CLAIM II: VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS  
 8 TO THE CONSTITUTION, PURSUANT TO 42 U.S.C. § 1983**

9 33. Intervenor incorporates paragraphs 1-32 as if fully set forth herein.

10 34. SB 6251 is invalid under the First and Fourteenth Amendments to the United  
 11 States Constitution because it purports to impose strict criminal liability on online service  
 12 providers such as Backpage.com and others for the content of third-party advertisements, in the  
 13 absence of proof of scienter, particularly concerning any knowledge of the age of any individual  
 14 depicted in third-party content.

15 35. SB 6251 is invalid under the First Amendment because it is a content-based  
 16 restriction that impermissibly chills a substantial amount of protected speech, is not narrowly  
 17 tailored to serve the State’s asserted interests, and is far from the least restrictive alternative  
 18 available to address the State’s interests.

19 36. SB 6251 violates the Fourteenth Amendment because it is vague and provides  
 20 neither adequate notice to citizens of what constitutes unlawful conduct nor adequate standards  
 21 to prevent its arbitrary enforcement.

22 **CLAIM III: VIOLATION OF THE COMMERCE CLAUSE  
 23 OF THE CONSTITUTION, PURSUANT TO 42 U.S.C. § 1983**

24 37. Intervenor incorporates paragraphs 1-36 as if fully set forth herein.

25 38. SB 6251 violates the Commerce Clause of the United States Constitution because  
 26 the law attempts to regulate commercial transactions taking place wholly outside the State of  
 Washington.

1       39. The law violates the Commerce Clause of the United States Constitution because  
2 it seeks to apply Washington law in a manner that constitutes an unreasonable and undue burden  
3 on interstate commerce that is excessive in relation to any local benefit conferred on the State of  
4 Washington and is likely to subject parties to inconsistent state regulations.

5                   **CLAIM IV: DECLARATORY RELIEF PURSUANT TO 28 U.S.C. § 2201**

6       40. Intervenor incorporates paragraphs 1-39 as if fully set forth herein.

7       41. This action presents an actual case or controversy between Intervenor and  
8 Defendants concerning the validity and enforceability of SB 6251.

9       42. Because SB 6251 violates the CDA, 47 U.S.C. § 230, and the First and Fourteenth  
10 Amendments to and the Commerce Clause of the United States Constitution, Intervenor asks for  
11 a declaration that the law is invalid and unenforceable pursuant to 28 U.S.C. § 2201.

12                   **PRAYER FOR RELIEF**

13                   WHEREFORE, Intervenor respectfully requests that the Court:

- 14       1. Declare that Washington Senate Bill 6251 violates 47 U.S.C. § 230 and the First  
15                   and Fourteenth Amendments to and the Commerce Clause of the United States  
16                   Constitution, and is invalid and unenforceable;
- 17       2. Preliminarily and permanently enjoin Defendants and their respective officers,  
18                   agents, servants, employees, and attorneys, and those persons in concert or  
19                   participation with them from taking any actions to enforce Washington Senate  
20                   Bill 6251, including any investigation, subpoena, arrest, and/or prosecution under  
21                   the law;
- 22       3. Award Intervenor costs of suit incurred herein, including reasonable attorneys'  
23                   fees; and
- 24       4. Award Intervenor such other and further relief as the Court deems just and proper.

1 Dated: July 3, 2012.

2 By: /s/ Venkat Balasubramani  
3 Venkat Balasubramani, WSBA #28269  
4 FOCAL PLLC  
5 8426 40th Ave SW  
6 Seattle, WA 98136  
7 Tel: (206) 529-4827  
8 Fax: (206) 260-3966  
9 venkat@focallaw.com

10 Matthew Zimmerman (*pro hac vice*)  
11 ELECTRONIC FRONTIER  
12 FOUNDATION  
13 454 Shotwell Street  
14 San Francisco, CA 94110  
15 Tel: (415) 436-9333  
16 Fax: (415) 436-9993  
17 mattz@eff.org

18 *Attorneys for Plaintiff-Intervenor*  
19 *The Internet Archive*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 2012, I electronically filed the foregoing COMPLAINT IN  
INTERVENTION with the Clerk of the Court using the CM/ECF system which will send  
notification of such filing to all counsel of record.

Dated: July 3, 2012.

s/ Venkat Balasubramani  
Venkat Balasubramani, WSBA #28269  
FOCAL PLLC  
800 Fifth Ave., Ste. 4100  
Seattle, WA 98104  
Tel: (206) 529-4827  
Fax: (206) 260-3966  
[venkat@focallaw.com](mailto:venkat@focallaw.com)